Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 17, 1993

Honorable Betty Denton
Member
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 93-48

Re: Regulations governing state funding of retirement programs provided for junior college faculty members (ID# 18188)

Dear Representative Denton:

As former chair of the House Committee on the Judiciary, you sought advice from this office about the state contribution to retirement programs available to junior college faculty members. You state that for the past nine years, state contributions to the Teacher Retirement System have been cut, while at the same time, the state has contributed to the optional retirement program at the full statutory rate of 8.5%. You thus conclude that the state seems to treat some junior college retirees differently from other members of this class, and ask whether this disparate treatment violates the fourteenth amendment.

Virtually all employees of public schools and state-supported institutions of higher education, including junior colleges, are required to belong to the Teacher Retirement System of Texas (hereinafter "Teacher Retirement System" or "retirement system"). Gov't Code § 822.001; *see also* Gov't Code § 821.001(6),(7),(12) (defining "employee," "employer," and "public school"). Section 825.404(a) of the Government Code provides for a state contribution to the retirement system of eight percent of the aggregate annual compensation paid to individuals participating in the system, but another provision establishes the state contribution as 7.31 percent for the fiscal biennium ending August 31, 1993. Acts 1991, 72d Leg., 1st C.S., ch. 13, § 27, at 273.

An optional retirement program ("ORP") has been made available to faculty members employed in state-supported institutions of higher education, including junior colleges. Gov't Code § 830.001. Its purpose is to aid in attracting high quality faculty members. *Id.* Faculty members may choose to participate in either the Teacher Retirement System or the ORP, which permits contributions to be placed in various kinds of investments offered by private companies or to be used to purchase retirement annuities. *Id.* § 830.002. Section 830.201 of the Government Code establishes an annual state contribution of 8.5 percent of the aggregate annual compensation of all participants in the ORP, but the current appropriations act appropriates only 7.31% of payroll to the ORP. Acts 1991, 72d Leg., 1st C.S., ch. 19, at 801. Thus, during the current biennium, the same rate of state contribution applies to the Teacher Retirement System and the ORP.

The state's contributions for retirement purposes are allocated differently under the Teacher Retirement System and the ORP. All assets contributed by the state to the Teacher Retirement System must be used to pay benefits to persons currently retired. Gov't Code § 825.314. The state's contributions for the ORP go to the company providing the faculty member's retirement program, and the retirement benefits are ultimately provided by the company. *Id.* § 830.202(b), (c).

You have not stated whether different rates of state contribution to the two retirement programs would affect the benefits ultimately paid to retirees. We are unable to make this determination in the process of preparing a legal opinion, since it would require the investigation of evidence and the resolution of fact questions. We will, however, direct you to a prior opinion of this office that sets out the test for violation of the equal protection clause. Attorney General Opinion JM-401 (1985) addressed the sick leave provision applicable to state employees. This provision was questioned because it did not provide sick leave for faculty members with appointments of less than twelve months at institutions of higher education. The opinion addressed article I, section 3 of the Texas Constitution, which guarantees equality of rights to all persons, and the equal protection clause of the fourteenth amendment of the United States Constitution. It stated as follows:

> The Texas Constitution guarantees equality of rights to all persons but does not forbid reasonable classifications. A classification is reasonable if it is based on a real and substantial difference that relates to the subject of the enactment and operates equally on all within the class. . . . Classifications made by the legislature are largely within the discretion of the legislature and will not be stricken down by the courts where there is a real difference to justify the separate treatment undertaken by the legislature. . . .
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> In reviewing legislation under the equal protection clause of the Fourteenth Amendment, the United States Supreme Court usually has used two primary standards. If a challenged law burdens an inherently "suspect" class of persons or impinges on a "fundamental" constitutional right, the law will be struck down unless the state demonstrates that the law is justified by a compelling need. If a suspect class or fundamental right is not involved, the law will be upheld unless the challenger can show that the classification bears no rational relationship to a legitimate state purpose or objective. . . . On a few occasions, the court also has utilized an intermediate test which asks whether the challenged law furthers a substantial interest of the state.

Attorney General Opinion JM-401 at 3-4 (citations omitted).

Attorney General Opinion JM-401 stated that the sick leave policy under consideration appeared to affect neither a suspect class nor a fundamental constitutional right, and it was not the kind of situation in which a court was likely to apply the intermediate substantial state interest test. It concluded that a court would apply the rational basis test, inquiring whether the legislature has a legitimate purpose and whether it is reasonable for the lawmakers to believe that use of the challenged classification will promote that purpose. In our opinion, a court would also apply the rational basis test to the difference in state contribution rates that you inquire about.

SUMMARY

If provisions allowing a different rate of state contributions to the Teacher Retirement System and the Optional Retirement System were challenged as violating the equal protection clause of the fourteenth amendment of the United States Constitution, a court would probably use the rational basis test to determine the validity of those provisions.

Yours very truly,

Susan L. Garrison

Susan L. Garrison
Assistant Attorney General
Opinion Committee